DUNLOP SLAZENGER (FAR EAST) SDN BHD

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[ORIGINATING MOTION NO: R1-25-19-98]
22 JULY 1998

LABOUR LAW: *Industrial Court - Jurisdiction - Application to strike off company as party on ground that it is not claimant's employer - Whether has to be heard as a preliminary issue - Whether court has no jurisdiction to decide on claim for unjust dismissal unless application to strike off heard first - Whether company's contention may be dealt with whilst deciding on claim for unjust dismissal*

LABOUR LAW: *Industrial Court - Jurisdiction - Procedure to challenge court's jurisdiction - Whether must challenge reference by minister - Whether failure to challenge confers jurisdiction on Industrial Court*

ADMINISTRATIVE LAW: *Remedies - Certiorari and mandamus - Leave to apply while reference under s. 20 Industrial Relations Act 1967 pending before Industrial Court - Whether leave ought to be granted*

Upon a reference by the minister, the Industrial Court was set to hear the claim by the second respondent that he was unjustly dismissed from employment by the applicant. Before the hearing, however, the applicant filed an application with the same court applying to have itself struck of as a party on the ground that it was not the employer of the second respondent. At the commencement of hearing, the applicant pursued its application but the Industrial Court made no order on this and instead directed that the matter referred by the minister was to proceed. The applicant then requested an adjournment to make applications to the High Court to determine whether the applicant is the employer of the second respondent. As the second respondent had a witness from Hong Kong in court for the hearing of the matter referred by the minister, the court postponed the case *sine die* and ordered costs to be thrown away.

The applicant subsequently filed this application for, *inter alia,* leave to apply for an order of *certiorari* to quash the "no order" decision of the Industrial Court on its application for striking off and an order of mandamus directing the Industrial Court to hear and determine its application at the outset.

Held:

[1] The applicant did not challenge the decision of the minister in making the reference to the Industrial Court. The unchallenged reference confers threshold jurisdiction on the Industrial Court to proceed with the matter under reference. Once it is seized of the dispute in the threshold sense, the Industrial Court is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. After delivery of pleadings, which was done in this case, the Industrial Court must go on to decide whether there was a dismissal and if so, whether the dismissal was for just cause or excuse. In such proceedings, the question of whether the applicant was the employer may be an issue to be resolved.

[2] A party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry must do so by seeking to quash the minister's reference. The threshold jurisdiction of the Industrial Court cannot be challenged without joining the minister and seeking relief against him.

[3] By applying to have itself struck off as a party, the applicant was attempting to prevent the Industrial Court from exercising its threshold jurisdiction to proceed with the hearing of the matter under reference. To determine whether or not there was a dismissal as alleged by the second respondent, it must be established that the dismissal was done by an employer upon his workman. The applicant at the outset cannot prevent the Industrial Court from inquiring into the issue without going into the merits of the parties' representations by hearing evidence from both sides. By deciding on the applicant's application at the outset as a preliminary issue, the Industrial Court would be abdicating its duty by the reference to go into the merits.

[4] If the applicant is seriously contending that it is not the employer of the second respondent, the proper procedure that ought to be adopted is to seek to quash, by *certiorari*, the minister's reference and, in the same proceedings, seek an order of prohibition prohibiting the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. If no such challenge is taken, the Industrial Court must be permitted to decide the dispute to its conclusion and in the process, to deal with the jurisdictional question of whether the applicant was in fact and in law the employer of the second respondent.

[5] The High Court should be very slow to grant leave to apply for an order of prohibition, *certiorari* or mandamus whilst a reference under s. 20 of the Industrial Relations Act 1967 is pending before the Industrial Court. To stay such proceedings would cause undue delay and lie against the

interests of industrial peace. Therefore, the Industrial Court by making no order on the application for striking off by the applicant but instead to proceed with adjudicating the dispute and to reserve its decision until the final award, was right in its decision.

[Application dismissed.]

Case(s) referred to:
Kathiravelu Ganesan v. Kojasa Holdings Bhd [1997] 3 CLJ 777 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), (3), 29(a)
Rules of the High Court 1980, O. 53 r. 1 (2)

For the plaintiff - Sunil K Vijayan; M/s Skrine & Co

Reported by S Dharmendran

JUDGMENT

Abdul Kadir Sulaiman J:

The applicant is a member of the Dunlop Slazenger Group Limited of United Kingdom. It is the Headquarters of the Group in the Far East since 1991. By a contract of employment exh. as "SB-2" the second respondent was appointed by the applicant as a general manager – Golf Sourcing Department in Malaysia effective from 1 April 1991. By a letter exh. as "SB-3" dated 19 April 1996, the group in the United Kingdom terminated the services of the second respondent on 22 April 1996 on the ground that his position has become redundant.

Considering that he has been dismissed without just cause or excuse, the second respondent made representations to the director general of the Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 (hereinafter referred to as "the 1967 Act") for reinstatement. Reconciliation effort failed, the director general notified the minister, who in pursuance of s. 20(3) of the 1967 Act referred to the first respondent for an award. The applicant did not challenge this reference by the minister. According to the statement in reply filed by the applicant with the first respondent, it avers, *inter alia*, that the first respondent has no jurisdiction to adjudicate the matter as the second respondent was not its employee but that of the Group in the United Kingdom and the contract of employment was never intended by the parties to be governed by the laws of Malaysia. It further avers that the letter of termination of the second respondent's service was issued by the Group in United Kingdom. The representations of the second respondent was scheduled for hearing before the first respondent on 16 January 1998.

In the meanwhile, on 12 January 1998, exh. as "SB-9" the applicant filed an application with the first respondent applying for itself to be struck off as a party under s. 29(a) of the 1967 Act. The ground of the application is that the applicant is not the employer of the second respondent in law or in fact.

At the commencement of the hearing on 16 January 1998, the learned counsel for the applicant submitted on the application of 12 January 1998 for striking off. He relied on exh. "SB-3" – the letter of termination – in support of the contention that the applicant is not the employer of the second respondent. At the very least, he submitted, it created a doubt as to who the employer is. At the end of the day the first respondent made no order on the application for striking off the applicant as a party to the proceedings before it and directed that the matter of the reference by the Minister was to proceed, and the reason be given in the final award. Upon the direction, the learned counsel for the applicant requested for an adjournment to consider the merit of the reference to enable it to make necessary application to the High Court to determine whether the applicant is the employer of the second respondent. Upon this request for an adjournment of the proceedings, the learned counsel for the second respondent applied for costs thrown away as the witness for the second respondent from Hong Kong was in court for the hearing of the matter under reference by the Minister. Finally, the first respondent postponed the case *sine die* with an order for costs of RM3,200 to be paid by the applicant within one month.

Aggrieved by the decision of the first respondent, the applicant filed this motion *ex parte* for leave to apply for an order of *certiorari* to quash the "no order" decision of the first respondent on its application for striking off and an order of mandamus directing the second respondent to hear and determine at the outset its application for striking itself off as a party. In the said application, the applicant also applies for a declaration that it is not the employer of the second respondent and also for an order to quash the decision of the first respondent in awarding costs thrown away on account of the adjournment. The motion of the application is supported by an affidavit affirmed by Scott Brown, its managing director and a statutory statement under O. 53 r. 1 (2) of the Rules of the High Court 1980.

I heard the *ex parte* application of the applicant on 3 June 1998 and dismissed the said application on the ground that no *prima facie* shown that leave ought to be granted to apply for the orders. I ordered that the first respondent is to proceed with the adjudication upon the reference without delay and to hand down its award. I now proceed to provide my reasons.

The substantive matter was before the first respondent upon the reference by the Minister under s. 20(3) of the 1967 Act for the purpose of award upon the representations by the second respondent to be reinstated in his former

employment on the ground that he was dismissed by the applicant without just cause or excuse. The applicant did not challenge the decision of the Minister in making the reference to the first respondent. In that situation, based on the decision in *Kathiravelu Ganesan v. Kojasa Holdings Bhd* [1997] 3 CLJ 777; [1997] 2 MLJ 685 this reference by the Minister leaving unchallenged confers threshold jurisdiction on the Industrial Court to proceed with the matter under reference. Once it is seized of the dispute in the threshold sense, the Industrial Court is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. After delivery of pleadings, which were done in this case, the Industrial Court must go on to decide whether there was a dismissal by the applicant of the second respondent, and if so, whether the dismissal was for just cause or excuse. In such a proceeding the question of whether the applicant was the employer may be an issue to be resolved. A party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry must do so by seeking to quash the Minister's reference. The threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him. In this matter before me, the applicant by making an application to the first respondent to have it struck off as a party which was chosen by the second respondent to be his employer, is in fact an attempt to prevent the first Respondent from exercising its threshold jurisdiction to proceed with the hearing of the matter under reference with a view to make a decision by way of an award as to whether there was a dismissal, and if so, whether the dismissal was for just cause or excuse. In a matter such as this, to determine whether or not there was a dismissal as alleged by the second respondent, there must be established that the dismissal was done by an employer upon his workman in his employ. The applicant at the outset cannot prevent the first respondent from inquiring into the issue without going into the merit of the representations by hearing evidence from both sides. By deciding on the application of the applicant at the outset as a preliminary issue, the first respondent would be abdicating its duty by the reference to go into the merit. The Federal Court in the above-quoted case has said that having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection, for the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. Permitting preliminary objections to the threshold jurisdiction being taken as was done in this case will only delay industrial adjudication by the Industrial Court. The applicant may say that it is not making a preliminary objection as such but the effect of its application for striking out amounts to that. If it is seriously contending that it is not the employer of the second respondent the proper step for it to take is to seek to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from

entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication, which is sad to say, was never done. So, where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question of whether the applicant was in fact and in law the employer of the second respondent. In the above-quoted case, the High Court allowed the respondent's application for prohibition against the Industrial Court from proceeding with the adjudication upon a reference by the Minister on the ground that the dispute was extra-territorial in nature and hence it could not adjudicate upon it. The Supreme Court reversed the order of the High Court on an appeal by the appellant. Gopal Sri Ram JCA, delivering the judgment of the court has this to say at p. 700:

> In our judgment, unless the Minister is separately or jointly challenged in making a reference, the High Court should be very slow to grant leave to apply for an order of prohibition against the Industrial Court whilst a reference under s. 20 is pending before the tribunal. To stay such proceedings would cause undue delay and lie against the interests of industrial peace.

Though it relates to an order of prohibition, in my view, which I hold, the same would apply in the case of an order for *certiorari* or mandamus for to do so whilst a reference under s. 20 is pending before the first respondent would cause undue delay and lie against the interests of industrial peace. Therefore, the first respondent by making no order on the application for striking off by the applicant but instead to proceed with adjudicating the dispute and to reserve its decision until the final award, was right in his decision. There is no error whatsoever that would attract the wrath of the judicial review court.

But the matter did not end there for the learned counsel for the applicant sought unnecessary adjournment to enable the applicant to make this frivolous and vexatious application in the High Court causing hardship to the second respondent who was ready with his witness who came all the way from Hong Kong for the hearing of the reference before the first respondent. Upon the request of the learned counsel for the second respondent, the first respondent exercised its discretion in awarding costs thrown away. I see nothing wrong in its decision to award such costs to the second respondent. It was perfectly within his discretion to do so. Since my decision to refuse leave and to remit the matter back to the first respondent for early disposal of the reference, it would not be proper for me to deal with the matter relating to the application for a declaration. In the circumstances this *ex parte* motion of the applicant was dismissed.